Citation: *R. v. Ex-Able Seaman C.R. Hoddinott*, 2006 CM 24

Docket:200524

STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX

Date:21 February 2006

PRESIDING:LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
v.
EX-ABLE SEAMAN C.R. HODDINOTT
(Accused)

CHARTER DECISION
(Rendered orally)

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[1] This is an application made under paragraph 112.05(5)(e) of the Queen's Regulations and Orders for the Canadian Forces in that the Standing Court Martial is not an independent tribunal within the meaning of section 11*(d)* of the *Canadian Charter of Rights and Freedoms*, because military judges presiding at these courts martial have insufficient guarantees of judicial independence. This may not have been clear for the audience because it was not expressed in some length by the applicant but, of course, they asked the court to rely on written submissions. So this is in a nutshell, the purpose of the application made by the applicant.

[2] This application is the fourth of similar applications argued before standing courts martial presided by this military judge. The other cases are the Standing Court Martial concerning *Corporal H.P. Nguyen* held in Sherbrooke, Québec; the Standing Court Martial concerning *ex-Leading Seaman LaSalle* held in Gatineau, Québec, as well as Esquimalt, British Columbia; and the Standing Court Martial of *Corporal R.P. Joseph* held in North Bay, Ontario. These decisions were delivered orally in December 2005 and January 2006. None of those decisions were appealed and the court understands that the delay to file an appeal has expired.

[3] In this application, both parties asked this court, and the court accepts, to rely on the same evidence and for the same purposes as it was filed in the Standing Court Martial of *Corporal R.P. Joseph*. Based on the same evidence as in the case of *Joseph*, this court will reach a similar conclusion. The legal analysis raised in that matter, a serious question as to what should constitute the substantial and sufficient guarantees to ensure the security of tenure to military judges who presides at all courts martial under the current statutory framework.

[4] The court today will answer the following question: "Does the appointment of a military judge under section 165.21 of the *National Defence Act* contravenes section 11*(d)* of the *Charter*?" And if the answer to this question is "yes," is it justified under section 1 of the *Charter*?

[5] The court must answer "yes" to the first question. The appointment of a military judge under section 165.21 of the *National Defence Act* contravenes section 11*(d)* of the Charter. And based on the same evidence than it was in *Joseph*, the context, the historic and the relevant legislative and regulatory provisions, the court concludes that this violation has not been demonstrably justified in a free and democratic society, pursuant to section 1 of the *Charter*.

[6] I will not in this case repeat the long, lengthy legal analysis that was done in *Joseph*, but I will say that the nature of the functions and the increase role of the military judge as they clearly appear from the statutory and regulatory provisions which governs the constitution and proceedings of this Standing Court Martial at this time are such that the appointment of a military judge for a fixed term does not meet the minimal constitutional requirements of section 11*(d)* of the *Charter* in the context of modern military justice and the evolution of the concept of judicial independence. This court believes that a reasonable and right-minded person, informed of the relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically, and having thought the matter through, would conclude that a military judge appointed for a fixed term of five years presiding at a court martial does not possess such security of tenure as to be capable of deciding the cases that come before him on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decision, and this has not been demonstrably justified under section 1 of the *Charter*.

[7] It is well recognized that section 11*(d)* violations can hardly be justified when they affect judicial independence. This question was examined by the Supreme Court of Canada in *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick* [2002] 1 S.C.R. 405. Like in the *Mackin* case, the respondent has made no argument which could have addressed the infringement of judicial independence of this Standing Court Martial.

[8] The court will not repeat the comments of Chief Justice Lamer at paragraphs 60 to 66 of the *Généreux* decision that dealt with not only unique character of the military justice system, but also with the fact that any such parallel system is itself subject to *Charter*'s scrutiny, and if its structure violates the basic principles of section 11*(d)*, it cannot survive unless the infringement can be justified under section 1.

[9] This court believes that the system of military tribunals in Canada must comply with the evolution of the concept of judicial independence, which continues to evolve. If the court martial process, as opposed to the summary trial, plays such a vital role in the protection of an accused constitutional rights, as it was submitted by counsel for the respondent in his written submissions, it implies that the burden imposed on the government under section 1 is higher than it was before the decision of the Supreme Court of Canada in *Mackin*.

[10] It must be recognized that the statutory framework of military tribunals, particularly the courts martial presided by military judges, was significantly modified by an *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, chapter 35, and the amendments to the QR&Os. There is no issue with the fact that the necessity of maintaining a high level of discipline in the special conditions of military life is still a sufficiently substantial societal concern to satisfy the first arm of the proportionality test under a section 1 analysis. However, a Standing Court Martial presided by military judges appointed under subsection 165.21(2) does not constitute an independent and impartial tribunal under section 11*(d)* of the *Charter* and it does not, in this context, meet the second arm of the proportionality test.

[11] This court believes that the appointment of a military judge for a term of five years, renewable, does not constitute a minimal impairment of the right guaranteed by the *Charter* to be tried by an independent and impartial tribunal in the context of military justice and the current legislation. Where the court finds perfectly acceptable that officers may be appointed as military judges to strictly perform judicial functions or functions that are not incompatible with these functions, the justification of a system of service tribunals that consist of summary trials for minor offences held by an officer within the chain of command and of courts martial presided by military judges only, who play an important constitutional role, requires that the courts martial meet the highest possible standards of judicial independence. They protect the role of the court martial in the military justice system as well as the role of the presiding judge, but ultimately and more importantly the judged; that is, the person subject to the Code of Service Discipline.

[12] The appointment of a military judge for a fixed term renewable does not take sufficiently into account the evolution of the office of military judge or the expanded role and functions of a military judge under the current statutory framework in the context of a modern Canadian society. This framework and the recent evolution of the concept of judicial independence require that military judges must be appointed

until reaching the age of retirement. Therefore the court believes that subsection 165.21(2) of the *National Defence Act* could not be justified under section 1 of the *Charter*.

[13] There is no compelling legal requirement that a military judge appointed to hold office during good behaviour should have an age of retirement similar to other federally appointed judges or provincial court judges. In the context of the military justice system in which military judges presiding at courts martial are serving members of the Canadian Forces, the court believes that the exigencies of military service and the requirements of a system of military tribunals to be portable and efficient justify that military judges have a retirement age similar to that of other officers. It must be kept in mind that courts martial upholds the rule of law and the values of our Constitution anywhere on this planet to ensure the maintenance of discipline and for the benefit of every person subject to the Code of Service Discipline serving in Canada or abroad in a peacekeeping or humanitarian operation or in a conflict.

[14] The court is also not convinced that the age of retirement for military judges should be in a statute. This is not constitutionally required. However, the age of retirement should be similar for all military judges regardless of their rank. For that matter, it should be noted that the rank of a military judge is irrelevant to the appointment, the remuneration and the powers of a judge under the *National Defence Act* or the Queen's Regulations & Orders for the Canadian Forces. This question raises an equality issue amongst judges and has no impact on the independent status of the tribunal under section 11*(d)* of the *Charter*.

[15] With regard to the applicant's written submissions dealing with the *Canadian Forces Superannuation Act*, the court can only repeat that they are just highly speculative and not based on evidence.

[16] The court agrees however with counsel that QR&O article 19.75 is not compatible with the statutory framework concerning the removal of military judges for cause set out in section 165.23 of the *National Defence Act*. The Chief of the Defence Staff and the Chief Military Judge, as an officer having the powers of an officer commanding a command, have no authority to relieve from military duty a military judge who perform only judicial duties or duties that are not incompatible with those judicial duties. Such power would encroach on the exclusive jurisdiction of the Inquiry Committee. It also undermines two conditions of judicial independence; that is, security of tenure and institutional independence. Therefore, QR&O article 19.75 as it currently reads, contravenes section 11*(d)* of the *Charter* and it has not been justified under section 1. That is not to say that the Chief Military Judge, *es qualite*, would be precluded to fulfill its role and responsibilities to assign judicial duties or other duties that are compatible with judicial duties, which is part of institutional or administrative independence. As it was in the case of *Joseph*, *Nguyen*, and *Lasalle*, counsel did not raise the fact, or did not raise an issue concerning QR&O article 101.08, but the court

would come to the same conclusion; that is, this QR&O article 101.08 entitled "Relief of Performance of Military Duty - Pre and Post Trial", is equally problematic. Therefore, any corrective or remedial approach retained by the court with regard to QR&O article 19.75 should be adapted to ensure QR&O article 101.08 complies with the *Charter*.

[17] With regard to the statutory and regulatory framework dealing with the current removal process applicable to military judges, this court believes that the applicant has not established on a balance of probabilities that it contravenes section 11*(d)* of the *Charter*. There is no constitutional requirement that it should be in a statute. Moreover, the procedure to be followed by the Inquiry Committee does not have to be as detailed as it appears in the Judges Act. The military judge subject of removal for cause after an inquiry by the Inquiry Committee is entitled by law to the highest standards of procedural fairness as this was recognized by the Supreme Court of Canada in the decision *Moreau-Bérubé v. New Brunswick* (Judicial Council), [2002] 1 S.C.R. 249.

[18] With regard to the issues dealing with the renewal process, the court does not have to answer to the applicant submissions, having determined that a reasonable and right-minded person, informed of the relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically, and having thought the matter through, would conclude that a military judge presiding at a court martial does not possess such a security of tenure as to be capable of deciding the cases that come before him on their merits without interference by any outsider with the way in which the judge conducts his or her case and makes his or her decision, unless that judge is appointed until reaching the age of retirement.

[19] The applicant has raised in his written submission an issue to the effect that the organization documents creating the office of the Chief Military Judge issued by the Minister and issued by or under the authority of the Chief of the Defence Staff undermined the institutional independence of the Chief Military Judge and the military judges. Based on the evidence before this court, which is the same as it was provided in the case of Joseph, there is no merit to that argument. These documents are simply made for organizational purposes. First, the creation of that office and the fact that it is embodied as a unit of the regular force does not undermine any component of judicial independence. Should the Minister and the Chief of the Defence Staff rescind these orders, this would not affect the role, jurisdiction and powers of military judges and of the Chief Military Judge, that are set out in the *National Defence Act*. In the absence of any evidence, this court would again be left with mere speculations or conjecture in order to determine whether there is any real or reasonable likelihood of a contravention to the third condition of judicial independence.

[20] The applicant submitted also in his written submission that the current grievance process infringes judicial independence largely because the Chief of the Defence Staff, the officer charged with the control and the administration of the Canadian Forces under section 18 of the *National Defence Act*, is the final authority for all grievances including for the potential grievance submitted by a military judge. In addressing this issue, the court must keep in mind its own conclusion with regard that military judges shall be appointed until they reach the age of retirement. In these circumstances, the existence of a comprehensive grievance process applicable to all members of the Canadian Forces, including military judges, is not problematic *per se*. It may be argued that this process does not protect sufficiently military judges from potential interference by the executive because a sitting military judge would have to rely on that executive to correct a situation where the judge considers that he or she has been aggrieved.

[21] There again, this is certainly not an ideal situation to preserve or to protect judicial independence, but the court is not satisfied that a reasonable and right-minded person, informed of the relevant legislative provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically, and having thought the matter through, would conclude that a military judge who has security of tenure until reaching the age of retirement would be influenced in making his or her decisions because the Chief of the Defence Staff constitutes the final grievance authority. The grievance process provided in the *National Defence Act* from sections 29 to 29.28 possesses in the court's opinion, sufficient, important and objective standards notably the existence of the Canadian Forces Grievance Board, a body independent of the Canadian Forces and the judicial control exercised by the Federal Court, so the court believe that there is sufficient important and objective standards to meet the minimal standards of the personal and institutional dimensions of judicial independence and to allow a military judge to make his or her decision based strictly on merit.

[22] In the Standing Court Martial of *Corporal Joseph*, the court addressed the issue concerning what should be a fair and just remedy. This ruling stands. Based on the same evidence, the court would come to the same conclusion in this case. For those in attendance, the court would say that the applicant here request, as it was in the case of *Joseph*, the court to order that some statutory and regulatory provisions be declared invalid pursuant to section 52 of the *Constitution Act*, *1982*, as well as an order to stay the proceedings under section 24 (1) of the *Charter*.

[23] The respondent submitted in his written submission—submitted that any declaration of invalidity should only be carefully formulated but it should be suspended for such a period as will allow Parliament to devise a legislative response that will ensure that the rights and freedoms of accused persons appearing before courts martial are respected. In *Joseph*, the court believed that suspension was not necessary in order

to ensure the rule of law within the Canadian Forces and to protect the public. This also stands today.

[24] In the decision of *Joseph*, I commented on the fact that in the decision of *R. v. Lauzon*, the Court Martial Appeal Court concluded that section 177 of the *National Defence Act* had to be declared invalid because it provided for the establishment of Standing Courts Martial which consisted of "one officer, to be called the president, appointed by or under the authority of the Minister". The Court Martial Appeal Court came to the same conclusion of invalidity with regard to the regulations concerning the process of reappointing and removing military trial judges and the determination of their salaries. The Court Martial Appeal Court determined that the whole court was affected by this constitutional defect and there were no independent court and judges at this level to replace the Standing Court Martial and ensure military discipline, therefore the Court Martial Appeal Court applied the doctrine of necessity. Under sections 173 to 175 of the *National Defence Act*, as it now stands, a Standing Court Martial exists on its own and it does not have to be established. The military judge who is authorized to preside constitutes the Standing Court Martial. This authorization can only be read with the exclusive authority of the Chief Military Judge to assign military judges to preside at courts martial under section 165.25 of the *Act*.

[25] This court believes that the wording of sections 173 to 175 of the *National Defence Act* does not require any remedial order under section 52 of the *Constitution Act*, *1982*. The constitutionality of the Standing Court Martial is not in issue unless the military judge who constitutes the court does not possess the substantial and sufficient guarantees of judicial independence. In this context, the doctrine of necessity does not apply because the court is satisfied that, after the analysis of the interests at stake, the suspension of any declaration of invalidity is not required. The remedy granted by the court in the cases of *Lasalle*, *Nguyen*, and *Joseph* nor that it would in this case, does not cause the entire scheme by which the Canadian Forces are disciplined to collapse and create a vulnerable legal chaos that would have a detrimental impact on the ability of the Government of Canada to effect its foreign, defence, and security policies for the benefit of all Canadians.

[26] The remedies available under section 52(1) of the *Constitution Act*, *1982*, although they are not real remedies in any real sense, differ from those available under section 24(1) of the *Charter* because they lie on different foundations. Section 52(1) provides as follows:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

However, section 24(1) of the *Charter* reads:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[27] The supremacy of the Constitution expressed in section 52 of the *Constitution Act*, *1982* binds the State in its legislative action where section 24 (1) of the *Charter*, which is part of the Constitution, provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. For example, it is possible that a legislative provision does not offend the Constitution, but that an action made by a state agent contravenes a right protected under the *Charter*. However, an individual remedy under section 24(1) of the *Charter* will rarely be available in conjunction with an action under section 52 of the *Constitution Act*, *1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to section 52, that will be the end of the matter, the matter being the constitutional issue. No retroactive section 24 remedy or 24(1) remedy will be available.

[28] In the context of *Charter* cases, the courts have developed a variety of means available to them under section 52(1) of the *Constitution Act*, *1982* in order to properly address the challenge posed by invalid legislation. These means were fully discussed by Chief Justice Lamer in *Schachter v. Canada* [1992] 2 S.C.R. 679, and more specifically from 695 to 719. The basic rule laid in *Schachter* requires a court to determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

[29] In Constitutional Law in Canada, Carswell, 1997, (Looseleaf Edition), Volume 2, Professor Peter W. Hogg lists the choices that are available to a court under section 52(1), at page 37-3:

> 1. Nullification, that is, striking down (declaring invalid) the statute that is inconsistent with the Constitution;
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> 2. Temporary validity, that is, striking down the statute that is inconsistent with the Constitution but temporarily suspending the coming into force of the declaration of invalidity;
>
> 3. Severance, that is, holding that only part of the statute is inconsistent with the Constitution, striking down only that part and severing it from the valid remainder;
>
> 4. Reading in, that is, adding words to the statute that is inconsistent with the Constitution so as to make it consistent with the Constitution and valid;
>
> 5. Reading down, that is, interpreting a statute that could be interpreted as inconsistent with the Constitution so that it is consistent with the Constitution; and

> 6. Constitutional exemption, that is, creating an exemption from a statute that is partly inconsistent with the Constitution so as to exclude from the statute the application that would be inconsistent with the Constitution.

[30] As it was the case in *Joseph*, the court has already concluded that the appointment of a military judge for a term of five years contravenes section 11*(d)* of the *Charter* in the context of military justice and the evolution of the concept of judicial independence. The court had also determined that QR&O articles 19.75 and 101.08 were incompatible with section 165.23 of the *National Defence Act* and they also contravene section 11*(d)* of the *Charter*. The court here has no reasons to defer. As it was decided in *Nguyen*, *Lasalle*, and *Joseph*, the court ought to act with judicial restraint in light of the inconsistency of the deficient provisions in the circumstances.

[31] The evolution of the role and functions of the office of military judge stands out so clearly from the amendments to the *National Defence Act* by the *Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1998, c. 35, that this court is still convinced, based on the totality of the evidence, that Parliament intended the military justice system, through the Code of Service Discipline, to reflect the importance of the place that must be occupied by independent and impartial courts martial presided by military judges in the perspective of the system of military tribunals as a whole. These courts martial presided by military judges play the essential and exclusive role of upholding the rule of law and protecting the constitutional rights of persons subject to the Code of Service Discipline within the military justice system.

[32] Therefore, the court considers that the minimal constitutional requirement of judicial independence implies that a military judge shall be appointed to hold office during good behaviour until reaching the age of retirement. And I will repeat what I had said in *Joseph*, that with respect for those who would hold a different view, this court, as it was the case in *Joseph*, strongly believes that any approach falling short of an appointment until reaching retirement age would prove to be not in the best interest of the independent status of the court martial, and more importantly, it would undermine the standards of professionalism that are required of a modern Canadian judiciary which shall apply to military judges.

[33] Based on the approach adopted by Lamer C.J. in *Schachter*, at pages 718 and 719, the court believes as it was decided in the case of *Joseph*, *Nguyen*, and *Lasalle*, that severance should be used to remove the portion of subsection 165.21(2) of the *National Defence Act* that is inconsistent with the Constitution and that is the words "for a term of five years". This would not affect the legislative purpose of ensuring that a court martial presided by military judge is independent and impartial. It is even believed that it would also serve that objective. The reading of subsection 165.21(2) of the *Act* reveals that the choice of means used by Parliament to further that objective, the means being a fixed term of five years that is renewable is not so unequivocal that

severance would constitute an unacceptable intrusion into the legislative domain. Severance does not, in the circumstances, involve an intrusion into the legislative decisions as to change the nature of the legislative scheme in question, that is to provide the system of military tribunals with courts martial that are independent and impartial. In addition, the use of severance would have no meaningful budgetary repercussions.

[34] In *Joseph*, *Lasalle*, and *Nguyen*, the court believed that the method of "reading in" should be used in order to rectify the inconsistency of QR&O articles 19.75 and 101.08 with the Constitution with respect of judicial independence by making them inapplicable to military judges. There is no reason to differ with that conclusion today.

[35] With regard to the remedy under section 24(1) of the *Charter* with regard to a stay of proceedings, the court martial in *Nguyen*, *Lasalle*, and *Joseph* relied on the decisions of the Supreme Court of Canada in *Schachter* as well as *R. v. Demers*, [2004] 2 S.C.R. 489, to state that the applicant was not entitled to a retroactive section 24 remedy in the circumstances, and the court mentioned that it was not one of those cases where a prospective remedy in the form of a stay of proceedings applied as it was contemplated by the Supreme Court in *Demers*. The court here would adopt the same conclusion.

[36] With regard to the conclusion and disposition of this matter, as I said, the court will conclude in the same way as it did in those three previous cases. And I will repeat the conclusion and disposition of the Standing Court Martial in *Nguyen*, *Lasalle*, and *Joseph*, in this case today. Therefore, the court grants the application in part and makes the following declarations under section 52(1) of the *Constitution Act*, *1982*:

1. Subsection 165.21(2) of the *National Defence Act*, R.S.C. 1985, c. N-5, contravenes in part section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. The words “for a term of five years” contravene section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. The words “for a term of five years” are severed from sub-section 165.21(2) of the *National Defence Act.*

2. Considering this court's ruling concerning the constitutionality of subsection 165.21(2) of the *National Defence Act*, R.S.C. 1985, c. N-5, the court concludes that subsection 165.21(3) of the *Act* contravenes section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. Therefore, the court strikes down subsection 165.21(3) of the *Act* and declares that it is of no

force and effect. This declaration of invalidity is sufficient and it is not necessary to deal with the regulations made pursuant to the invalid provision.

3. Article 19.75 of the Queen's Regulations and Orders for the Canadian Forces contravenes in part section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. In order to make article 19.75 of the Queen's Regulations and Orders for the Canadian Forces consistent with the Constitution, the court declares that paragraph 19.75(1) includes the words “to military judges or” inserted after the word “apply”.

4. Article 101.08 of the Queen's Regulations and Orders for the Canadian Forces contravenes in part section 11*(d)* of the *Canadian Charter of Rights and Freedoms*. This infringement has not been demonstrably justified as a reasonable limit pursuant to section 1 of the *Canadian Charter of Rights and Freedoms*. In order to make article 101.08 of the Queen's Regulations and Orders for the Canadian Forces consistent with the Constitution, the court declares that paragraph 101.08(1) includes the words “other than a military judge” inserted between commas after the word “officer”.

LIEUTENANT-COLONEL M. DUTIL, M.J.

Counsel :

Major J.J. Samson, Regional Military Prosecutions Atlantic
Counsel for Her Majesty The Queen
Major A. Appolloni, Directorate of Defence Counsel Services
Counsel for ex-Able Seaman Hoddinott